

Traditions and Tips for Oral Argument before the Indiana Supreme Court

By Josh S. Tatum¹

Open your argument with “May it please the court.” This makes you look like you’ve been here before. It also gets the Court’s attention without saying something that they need to think about.

Talking Points. Develop “talking points”—phrases that sum up your main arguments that you can lean on when you’re feeling anxious in front of robed judges. Millionaire celebrities didn’t hire Johnny Cochran because his famous rhyme “If it doesn’t fit, you must acquit” was cute. They hired him because his methods produced results. On the other hand, don’t be too “cute” or the judges don’t take you seriously.

Statement of the Core Issue(s). Begin speaking with a concise, one-sentence statement of the core issue(s) of the case. This should focus on what you think the court is most interested in resolving, not necessarily what your strongest argument is. Nevertheless, phrase this opening sentence in a way favorable to your side. You might also specifically ask for what you’d like to do here, although that is sometimes obvious by the position you take.

Roadmap. Explain to the court how you are going to proceed. As you may have learned, “Tell them what you’re going to tell them, tell them, and then tell them what you told them.” This consists of 2-4 brief (one-sentence) statements that summarize each of your arguments. This is the best, and sometimes the only, way to get all your arguments out before the justices spend the rest of your time asking questions on one of your points or something you didn’t expect at all. This also sometimes can serve as an opportunity to refresh the justice’s minds of what the case is about. Don’t feel like you have to raise all issues in your argument. The most important ones are usually enough. Still, your roadmap gets your foot in the door.

Finish. End with a short statement of what you’d like the court to do. For instance, “We respectfully ask the court to affirm the trial court’s decision granting dismissal.” Remember, there is no penalty for finishing early.

Time. You will have 20 minutes for argument. Appellants (Petitioners in cases where transfer has not yet been granted) argue first and may have rebuttal. You must state to the court how much time you will take for rebuttal, however the rebuttal time is a part of the 20 minutes.

The timer begins when you start speaking and ends when you clearly finish (this ensures the timer can accurately allot your rebuttal time). There are three lights: Green, Yellow, and Red. Green when the timer starts, Yellow means you have 2 minutes left, and Red starts flashing when your time ends. This applies to both opening argument and rebuttal.

During your opening argument, the lights are set to the time you tell the timer and the Court, so it is at your discretion to continue the opening argument once your red light is flashing. The time you go over will be subtracted from the time reserved for rebuttal. If the yellow light is the first light you see when you begin your rebuttal, make sure to look for how much time you have left, as it is possibly less than 2 minutes left.

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Etiquette. Judges can interrupt attorneys. Attorneys should never interrupt judges. If you see a justice who seems to want to ask a question, make sure to wait a second so that you don't stand in the way of the question.

If the red light starts flashing, make sure to either wrap up your argument in 30 seconds or less or stop as soon as you see it and ask permission of the Court to conclude your argument. Say something like, "May I conclude?" or "May I finish answering your question?" Some attorneys say "I see my time is up, . . ." but I find this a waste—the judges can see the red light, too.

Strategy. The most important thing to remember when arguing before the Court is to ANSWER THE QUESTIONS. The best way to do this is to answer with a yes or a no and then explain, or very briefly answer the question and then explain. As a matter of deference, try your best not to directly disagree with a justice, but try to understand where the questioner is coming from, acknowledge that as a valid position, and explain why yours is the better perspective.

The side with the first argument has the advantage of framing the issues and the last word. On the other hand, the second side has the advantage of time to listen for the issues the justices find most important and most interesting and can tailor the bulk of argument to address these. Make sure to maximize these advantages for your client.

The Court chose to hear this case. It will help you a great deal to think about *why*. There are two reasons the court takes a case it doesn't have to. First, there is an important issue in the law that needs revisiting or clarifying. Second, the Court of Appeals did something so wrong it has to be corrected. Most cases fall into the former category, especially when the Court has a heavy caseload. For those cases, the Court will be thinking about not only this case but the next case and the hundredth case that has similar issues. Spend time thinking about the ramifications—good and bad—of similar but different cases if your side wins or loses.

Admit your weaknesses. If a justice raises a weakness in your case, acknowledge it and explain why you win despite that fact. Usually, it is better to raise these weaknesses before the other party or a justice can raise them for you.

Style. The most important style tip is to BE AUDIBLE. The Supreme Court Courtroom doesn't have the greatest acoustics, and your quiet voice is not enough to travel to the bench, let alone the rest of the room, even with the aid of a microphone.

"Uh" and "Um" are not arguments. Practice thinking without verbalizing. Silence is a sign of a thoughtful counsel. Verbal stalling is the sign of something else. If a justice asks a hard question you haven't thought about, it is completely acceptable to tell the Court that this is the case, take a few seconds to come up with the best answer, and take your best shot.

Plant your feet into the soil of the Supreme Court Courtroom carpet. In other words, stand still! "Dancing" is distracting. Flailing the arms is similarly distracting. On the other hand, subtle body language *can* help your argument. "I once caught a really big fish," has a slightly less powerful impact than "I once caught a fish THIS BIG" while stretching your arms to show the audience how big the fish was. Follow this advice, and you might make a very big catch.